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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SACRAMENTO
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11 PACIFIC GAS AND ELECTRIC COMPANY, No. 02CS01631 Dept. 11
12 a California Corporation,

13 Petitioner and Plaintiff,
14 vs.

RULING ON SUBMITTED
MATTER
(PETITION FOR WRIT OF
MANDATE)

15 THE CALIFORNIA DEPARTMENT OF
16 WATER RESOURCES, and THOMAS M.
17 HANNIGAN, in his official capacity
as Director of the California
Department of Water Resources,

18 Respondents, Real Parties
19 in Interest and Defendants.
/

20 This matter came on for hearing on October 17, 2003.
21 The Court issued a tentative ruling. The matter was argued
22 and submitted. The Court now makes its ruling as follows:

23 Evidentiary rulings: California Department of Water
24 Resources' Motion to Strike portions of the Declaration of
25 James C. Maroulis dated September 2, 2003 is granted as to
26 paragraphs 6, 7 and 8 and Exhibits 3, 4 and 5 of the
27 declaration on the ground that they constitute extrinsic
28 evidence that is not part of the administrative record and

1 therefore are not admissible in this proceeding. The motion
2 is denied as to paragraph 3 of the declaration.

3 Any statements in petitioners' points and authorities
4 which rely on paragraphs 6, 7 and 8 and exhibits 3, 4 and 5
5 are deemed to be without evidentiary support.

6 The objections of Department of Water Resources
7 (hereinafter "DWR") to paragraphs 3, 4 and 5 of PG&E's
8 Request for Judicial Notice filed September 2, 2003, which
9 concern the same exhibits to the Maroulis declaration, are
10 sustained.

11 The parties have filed other requests for judicial
12 notice as to which no objection has been received: PG&E's
13 July 9, 2003 Request for Judicial Notice of 16 documents and
14 PG&E's October 2, 2003 Request for Judicial Notice of 3
15 documents. Those requests are both granted.

16 On the merits: This case challenges DWR's August 16,
17 2002, determination that its revenue requirements and costs
18 for the period January 1, 2003 through December 31, 2003,
19 are "just and reasonable," as well as DWR's August 16, 2002,
20 re-examination and redetermination of its revenue
21 requirements and costs for the period January 17, 2001,
22 through December 31, 2002.

23 The petition seeks a writ of mandate directing
24 respondents DWR and Hannigan to vacate their determination
25 that DWR's revenue requirements are "just and reasonable",
26 to take no action in furtherance of the August 16, 2002
27 Revenue Requirements, and to comply with the California
28 Administrative Procedures Act and "any other applicable

1 statute or regulation" prior to requesting or imposing DWR's
2 revenue requirements in charges to retail customers.
3 (Petition, pars. 9 and 67.) It also seeks a judicial
4 declaration that DWR's determination that its August 16,
5 2002 revenue requirements are "just and reasonable" and that
6 all actions pursuant to that determination are invalid and
7 void. (Petition, pars. 72 and 73.)

8 One of petitioner's primary contentions in its petition
9 and its briefs is that the "just and reasonable"
10 determination by DWR is a regulation that is subject to the
11 California Administrative Procedures Act (hereinafter "the
12 APA"). DWR issued emergency regulations establishing
13 procedures governing its "just and reasonable"
14 determination. (See Cal. Code Regs., tit. 23, sec. 510 et
15 seq.) However, petitioner has contended that these
16 regulations do not provide the protections established by
17 the APA.

18 On October 2, 2003, the Third District Court of Appeal
19 issued its decision in *Pacific Gas and Electric Company v.*
20 *State Department of Water Resources* (2003) 112 Cal.App.4th
21 477 ("*PG&E v. DWR I*"), which is now final. The Court of
22 Appeal held that the Water Code does not require a hearing
23 and that APA procedures do not apply to the revenue
24 requirement.

25 However, petitioner has also argued that DWR failed to
26 follow the procedures established in its emergency
27 regulations. The Court agrees. DWR's Rule 513(a) requires
28 that DWR notify the public and make available for comment

1 any "significant material that it intends to rely upon in
2 making its determination ... which was not identified in the
3 proposed determination" Petitioner pointed out in its
4 briefs that DWR omitted various materials referenced and
5 relied upon by Douglas Montague regarding the reasonableness
6 of DWR's proposed bond issuance. (See AR 03067-84.)
7 Further, Rule 512(e)(2) requires that DWR include in its
8 proposed determination "reference to the material relied
9 upon by the department to support the proposed
10 determination." But on August 9 and 13, 2002, DWR disclosed
11 significant additional material that DWR stated had been
12 relied upon in its June 14 Proposed Determination. (See AR
13 05585-86, 06253-55.) The information should have been
14 provided with the June 14, 2002 proposed determination.
15 DWR's reliance on Rule 513(a) is misplaced, as that rule
16 concerns additional material that the "department *intends* to
17 rely upon in making its determination" (Cal. Code Regs.,
18 tit. 23, section 513(a), emphasis added). Respondent
19 appears to have shortened the time period and opportunity
20 for public comment which is contemplated by its own
21 regulations by disclosing these materials very near the end
22 of the process. The late-disclosed materials include the
23 declaration of Ronald O. Nichols, DWR's consultant. This
24 declaration is approximately 28 pages in length, single
25 spaced, explaining the history of DWR's power purchase
26 program, and it cites and relies on approximately 47
27 exhibits which are hundreds of pages in length and which are
28 also found elsewhere in the record. (See "Declaration of

1 Ronald O. Nichols regarding the history of DWR's net short
2 energy procurement process under long-term contracts", AR
3 0555-05584 and 0561-05639, and Exhibits, AR 05650-06244.)
4 The late disclosed materials also include the declaration of
5 DWR's employee, Susan Lee, regarding DWR short term power
6 purchases. (AR 05605-05610.) Respondent's arguments that
7 it complied with its own regulations and that petitioner had
8 adequate time to respond to these materials are
9 unpersuasive. As respondent stated at the hearing, the
10 Nichols declaration is a road map to the other materials,
11 but it was executed only eight days before the respondent
12 issued its determination that the revenue requirements were
13 just and reasonable.

14 Even though the APA procedures do not apply to the
15 revenue requirement, this does not mean that respondent is
16 free to disregard the rules that respondent has adopted to
17 govern the process.

18 Respondent's memorandum of points and authorities does
19 not address these specific points raised by petitioner
20 concerning DWR's compliance with its own regulations. It
21 makes only a more general argument (unsupported by citation
22 to the record) that respondent not only complied with its
23 own regulations but provided substantially more opportunity
24 for public participation than the regulations require.

25 The additional arguments made by respondent at the
26 hearing of this matter are not persuasive. The additional,
27 late-disclosed materials and the "roadmap" they provide to
28 the large volume of charts, diagrams, contracts and other

1 documents appear extremely significant to respondent's just-
2 and-reasonable determination and also to the ability of the
3 Court to review that determination, since the Court's review
4 is limited to the administrative record.

5 The parties disagree as to the appropriate standard to
6 be applied by respondent DWR. DWR's regulations, adopted as
7 emergency regulations prior to the decision in *PG&E v.*

8 *DWR I*, require that "the record of the determination must
9 demonstrate by substantial evidence that the revenue
10 requirement is just and reasonable" (Cal. Code Regs.,
11 tit. 23, sec. 517.) Petitioner has urged the Court to
12 instruct respondent that its review pursuant to Public
13 Utilities Code section 451 should apply the "clear and
14 convincing evidence" standard applied in certain decisions
15 of the California Public Utilities Commission. Respondent
16 DWR, on the other hand, appears to contend that the PUC
17 applies a "substantial evidence" standard and thus that DWR
18 has applied the PUC's standard. Public Utilities Code
19 section 1757 provides that "substantial evidence" test is to
20 be applied *in judicial review* of decisions of the PUC.

21 Although it appears that the PUC has applied the "clear and
22 convincing" standard in "just and reasonable" reviews,
23 petitioner has not shown the reason for its application of
24 that standard. Therefore, the Court declines to find that
25 DWR must apply the "clear and convincing evidence" standard.
26 However, DWR's reference in its regulations to "substantial
27 evidence", a standard normally applied in judicial review,
28 appears inconsistent with its duty to determine that its

1 revenue requirements are just and reasonable. Nevertheless,
2 it is unclear that respondent's reference to the
3 "substantial evidence" test would affect the Court's review
4 of DWR's determination. The Court's review pursuant to Code
5 of Civil Procedure, section 1085 is to determine whether
6 respondent's just-and-reasonable determination is arbitrary
7 and capricious and lacking in evidentiary support.

8 In addition to its arguments concerning DWR's violation
9 of its own procedures, petitioner contends that DWR's "just
10 and reasonable" determination is arbitrary and capricious
11 and is lacking in evidentiary support. Petitioner's brief
12 includes arguments that the record lacks market data needed
13 to conduct a "just and reasonable" review, lacks a net
14 present value analysis needed to analyze DWR's decision to
15 purchase long-term power, lacks evidence regarding DWR's
16 decision to accept power at particular locations, and lacks
17 the information necessary to determine whether DWR's
18 renegotiated contracts are "just and reasonable".

19 Petitioner also contends that DWR's use of a benchmark price
20 for power purchases was no substitute for a just and
21 reasonable review. Petitioner further contends that DWR
22 acted imprudently by executing billions of dollars of
23 contracts at a time when DWR believed the market for long-
24 term power was dysfunctional.

25 In opposing these arguments, respondent cites numerous
26 pages—perhaps thousands—from the administrative record
27 lodged in the Superior Court in *PG&E v. DWR I*, Sacramento
28 Superior Court Case No. 01CS01200. Respondent asserted in

1 its notice of lodging filed in this case on July 16, 2003
2 that the record of *PG&E v. DWR I* was incorporated by
3 reference in the record lodged July 16, 2003 in this case.
4 However, respondent has not arranged to provide that prior
5 record to the Court for its review in this case. (See Cal.
6 Rules of Court, rules 323(c) and 347 as instructive.)
7 Petitioner filed, on October 2, 2003, an Appendix of
8 Documents from Quasi-Legislative Record which includes
9 documents petitioner has cited from the administrative
10 record in both cases. However, only a few of those are
11 pages from *PG&E v. DWR I*. Thus the Court does not have a
12 sufficient record at this time to rule on those substantive
13 arguments.

14 However, it is unnecessary for the Court to rule on
15 these arguments in light of its ruling that respondent
16 abused its discretion by failing to comply with its own
17 regulations concerning the just-and-reasonable review
18 procedure.

19 The Court finds that respondent abused its discretion
20 by failing to comply with its own regulations in making its
21 "just and reasonable" determination of August 16, 2002. A
22 peremptory writ shall issue from this court remanding this
23 matter to Respondent and commanding Respondent to set aside
24 its determination of August 16, 2002. The writ shall
25 further command Respondent to reconsider its action in the
26 light of this ruling and to conduct further proceedings in
27 accordance with its own regulations.

This Court's ruling does not nullify, interfere with, or in any way affect any action that has been taken by the California Public Utilities Commission, including the enforcement and collection of existing rates and charges, to implement the Department's revenue requirements.

Petitioner shall prepare and submit a judgment for signature by the Court and a writ for issuance by the clerk. Petitioner shall recover its costs pursuant to a memorandum of costs.

DATED: DEC 26 2003

GAIL D. OHANESIAN

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JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF SERVICE BY MAILING

(C.C.P. Sec. 1013a(3))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing RULING ON SUBMITTED MATTER (PETITION FOR WRIT OF MANDATE) by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: December 29, 2003

Superior Court of California,
County of Sacramento

By: D. ROGERS,
Deputy Clerk